

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In re Application No. 93-2	)	PREHEARING ORDER NO. 6	679
of	)		
	)		
KVA RESOURCES, INC., and	)	ORDER DENYING	
CSW ENERGY, INC.	)	SUMMARY JUDGMENT;	
	)	DENYING CONTINUANCE	
For Certification of the	)		
NORTHWEST REGIONAL	)		
POWER FACILITY	)		

This matter involves an application by CSW energy Inc., and KVA Resources, Inc., ("KVA") for certification of a site at Creston, Washington under Chapter 80.50 RCW. KVA's application includes a proposal to use rights to water in the Spokane river, but physically to remove ground water that is stored in "bank storage" of Lake Roosevelt (the Columbia River).

**Motion for Summary Judgment.** Several parties,<sup>1</sup> whom we call the "Movants" in this order, filed a motion for summary judgment arguing that (1) EFSEC is required to follow the substantive requirements of law and rule governing the authorization for use of public waters; and (2) under pertinent substantive Washington State law, no water is available for appropriation by KVA.

KVA responded, arguing that (1) EFSEC is not required to comply with the substantive requirements of law and rule governing the authorization for use of public waters; (2) KVA's proposed water withdrawals are not prohibited by the Columbia River Moratorium; (3) proposed withdrawals of water will not have a "measurable" impact upon fish; (4) under the vested rights doctrine, KVA is not subject to the Columbia River Moratorium because its application was submitted prior to the Moratorium; and (5) KVA's project is not subject to the Bureau of Reclamation's restriction on withdrawals referenced under Chapter 90.40 RCW.

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<sup>1</sup>These are Counsel for the Environment, State Department of Ecology, State Department of Fish and Wildlife, and U.S. Department of Interior, Bureau of Reclamation, and the Colville Tribes.

Counsel for the Environment and the Colville Tribes replied, disputing KVA's arguments. In addition, The Department of Fish and Wildlife filed a memorandum addressing the impact KVA's proposal would have on fish.

**Discussion.** Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and is entitled to judgment as a matter of law. Atherton Condo Ass'n v. Blume Dev., Co., 115 Wn.2d 506, 799 P.2d 250 (1990). A material fact is one upon which the outcome of the litigation depends in whole or in part. Morris v. McNicol, 83 Wn.2d 491, 591 P.2d 7 (1974). Summary judgment cannot be granted where there is a question of material fact. Mills v. Inter Island Tel. Co., 68 Wn.2d 820, 416 P.2d 115 (1966).

The Movants and KVA have made allegations and counter allegations as to the facts that underlie the motion. The factual issues that they present are material i.e., they affect the outcome of this action. Consequently, the matter cannot be resolved in a summary manner.

The issues raised in these motions require findings of contested fact that must be made by the Council only after a full evidentiary hearing. Any single issue in the proceeding could require denial or substantial mitigation. It is essential for the Council to review these issues in the context of the entire application. It is improper -- inconsistent with the policy of Chapter 80.50 RCW -- to segregate various factual and legal issues from the context of the Council's review of each application and to consider the application in a piecemeal manner.

At this point, the Council does not know whether it will want or will need to consider an option that is inconsistent in any way with the technical provisions of any law or agency rule. It will make that decision when reviewing the entire application. The parties' arguments will be on file and, if need be, can be renewed by the parties at the conclusion of the hearing.

The motion for summary judgment should be denied.

**Motion for continuance.** The Colville Tribes' reply memorandum asked for a continuance of the proceeding until the issues raised in the motion for summary judgment are resolved. The Tribe's motion for continuance should be denied.

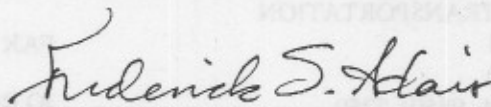
It is true that the motion raises factual and legal issues that could be dispositive to the entire proceeding. However, that is also true of other issues that may be raised. The Council's process is designed to allow it to consider the application as a whole, and to balance the interests involved. Unless a purely legal issue would dispose of an application, the Council will take issues out of context only upon a very strong showing that doing so is consistent with the Council's function and with the public interest.

ORDER

THE COUNCIL ORDERS That the Motion for Summary Judgment filed by Counsel for the Environment, et al., is denied, and

THE COUNCIL ALSO ORDERS That the Motion for Continuance until resolution of issues raised in the Motion for Summary Judgment, filed by the Colville Tribes, is denied.

Dated at Olympia, Washington and effective this 21<sup>st</sup> day of June, 1995.



Frederick S. Adair, Chair



NORTHWEST REGIONAL POWER FACILITY

AMENDED SERVICE LIST

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Application No. 93-2

CSW ENERGY INC., AND  
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NORTHWEST REGIONAL POWER  
FACILITY

APPLICATION NO. 93-2

CERTIFICATE OF SERVICE

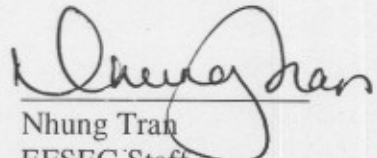
The undersigned certifies that on June 21, 1995, she served the enclosed:

PREHEARING ORDER NO. 6

ORDER DENYING SUMMARY JUDGMENT;  
DENYING CONTINUANCE

by depositing copies thereof in the United States mail, properly stamped and addressed, as  
indicated on the Northwest Regional Power Facility Service List.

DATED: June 21, 1995

  
Nhung Tran  
EFSEC Staff